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ABSTRACT

The unrest of the 1960s brought the fields of law and higher education together in the courts. Although tranquility has returned to campus, the courts show no sign of withdrawing from the field of higher education. This paper is an examination of the role the courts will play in higher education in the decade ahead. Three broad areas of litigation are discussed: (1) the allocation of increasingly scarce resources spurred by disputes between the university and the state and by disputes between or among academic institutions; (2) access to the benefits and rewards of higher education brought on by discrimination on the basis of sex, geography, and political affiliation as well as race; and (3) participation in the making of key academic decisions by previously excluded groups and constituencies. (JMF)

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Dynamics of Higher Education

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COURT AND CAMPUS—STRIKING A NEW BALANCE

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Professor O'Neil's paper was part of a dual program on Legal Implications presented July 9 at the 1973 NACUBO Annual Meeting. The following text, together with a presentation made by Mr. Roderick K. Daane, General Counsel for The University of Michigan, comprised a concurrent session dealing with "Dynamics of the Campus."

LAST WINTER A FLORIDA legislator introduced a bill designed (in his words) to "ensure due process to all university personnel who are fired or disciplined." The purpose of the bill was twofold. On the one hand, it sought to afford fairer procedures to academic personnel and thereby safeguard individual rights; "as matters stand now," observed the sponsor, "many professors claim that they have no effective way to protect themselves except by going to court." There was, however, a more practical rationale for mandating due process—a desire to "save the people's money by keeping certain personnel problems out of the courts." The author of the bill charged that Florida's universities had been "needlessly spending thousands of dollars to hire lawyers to represent the state in suits filed by disgruntled professors claiming discrimination."

The Florida bill (which apparently did not pass either house) is striking in several respects. In these days of legislative antipathy toward higher education, and especially toward faculties, such solicitude for academic due process is remarkable in itself. Even more revealing is the practical impetus of the proposed law—a desire to avoid expensive lawsuits over faculty grievances. (The bill's sponsor might have added that the heaviest costs of court contests over faculty rights do not lie in attorney's fees; even more costly are the diversion of academic and administrative time and energy from more vital pursuits, and the straining of collegial relations at a time when the fabric is already worn thin.) Thus a law designed to keep faculty grievances out of the courts makes inordinately good sense. Yet the Florida proposal appears to be the sole attempt to check the intervention of the courts into academic life. Lawmakers in other states may and do deplore the "judicialization" of higher education, but they fail to see that the solution lies not in strong rhetoric, but in understanding why the courts are involved and taking practical measures to reduce the occasions for intervention.

The courts and the law became a major part of academic life as a result of the student disorder of the late 1960s. In the preceding quarter century, the law reports show only a handful of cases dealing with higher education. Suddenly, in 1968, this trickle became a torrent. For several years the courts were full of student discipline suits—with some courts (like the federal Western District of Wisconsin, which includes Madison) so burdened by university cases that other judicial business came virtually to a halt. The consequence of this preoccupation with student protest and demonstration was to create a sharp imbalance between the *law* of higher education and the *practice* of higher education; two thirds or more of the reported cases in the past five years deal with perhaps five to ten percent of the work and activity life of institutions of higher learning.

As suddenly as the student cases hit the courts in the

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late 1960s, they disappeared in the early 1970s when relative tranquility returned to campus. Yet the courts have shown no signs of withdrawing from the field of higher education. Academic judgments and processes that were sacrosanct until they were challenged by claims of unconstitutional expulsion and suspension have now become permanently a matter of public concern. The authority of a judge or an opposing attorney to summon an awesome university president to the stand is not soon forgotten when the issues change. Thus courts that got into higher education at the urging of aggrieved students and their lawyers have retained a n interest in this fascinating and novel field.

What role will the courts play in higher education during the decade ahead? Three broad areas of litigation might be marked out for discussion—first, the allocation of increasingly scarce resources; second, access to the benefits and rewards of higher education; and third, participation in the making of key decisions. Each area should be reviewed in turn.

Allocation of Resources

Increasing litigation over allocation of resources seems likely for several reasons. First, because the share of federal and state funds going to higher education will remain static at best or actually decline. Second, because the competition between public and private institutions to share in that static or shrinking budget will probably increase. Third, because legislatures will impose tighter controls and restrictions upon the use of higher education funds in the interests of "accountability."

The disputes that reach the courts will be primarily of two types—those between the university and the state; and those between or among academic institutions. Recent experience in Michigan provides a dramatic example of the former type of conflict. When the state legislature attached a host of conditions to the 1970 higher education budget—setting faculty workloads, reordering admissions policies and constraining campus fiscal autonomy—the governing boards of the three major universities (Michigan, Michigan State and Wayne) brought suit challenging the lawmakers' power. For the third time since the beginning of the century, the Michigan state courts held that the legislature had overstepped the bounds of its authority and encroached upon that of the university governing boards. (There is at least a hint that this case involved a conflict *between* educational sectors as well as against the legislature. The state board of education appeared as a party in the case against the universities. There is a plausible inference that the elementary and secondary schools might have benefited from the losses of higher education.)

A comparable case arose in Pennsylvania about the same time, implicating the interests of private rather than public institutions. When the state legislature tried to get universities throughout the world to report every major crime or campus rules violation committed by a Pennsylvania student, Haverford College and several others brought suit to invalidate the law. They were joined as "friends of the court" by forty-one other colleges and universities, thus suggesting not only the commonality of interests but also the strength that may lie in numbers. The suit was almost totally successful.

Some forms of legislative interference may, of course, not be as readily amenable to judicial review. Soon after the close of the 1971 session, the presiding officers of the two houses and chairmen of the education committees of the Minnesota legislature sent letters to each public campus president setting forth a list of "particulars" to guide the disbursement of allocated funds. An administrator would disregard such "advice" at his peril, even though it lacked the concurrence of either house or the governor's signature. Yet there is no way in which any institution or individual could challenge in court a lawmaker's right to send such a letter to a university president. It is quite possible, therefore, that protective court decisions in this area may simply alter the *method* rather than the *extent* of legislative surveillance of higher education funds.

More novel, though possibly more ominous, is the prospect of lawsuits *among* colleges and universities over resources. There have been a few preliminary skirmishes. The federal courts in New York have twice rejected claims of unlawful inequity in the formula by which funds are apportioned between the two and four-year units of the City University of New York. More revealing is a lawsuit recently filed by the faculty of a small two-year college in Southern Washington. The complaint challenges the authority of the system-wide governing board to override an agreement negotiated with the local trustees for a salary scale higher than the state-wide policies. The system board claimed that the lower rate was required by the leveling off of state support for higher education. The faculty, however, claimed that the trustees should be permitted to use available local funds for this purpose if they wish. Both autonomy and the allocation of resources seem to be in issue in this intriguing contest between the local faculty and the state-wide board—with the campus administration and trustees sitting by in silence.

As the financial plight of American higher education worsens, resort to the courts for settlement of resource questions is certain to increase. Competition between *public* and *private* sectors may well intensify. State colleges and universities may, for example, challenge the eligibility of church-affiliated schools for public

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funds (as the administrators of the Bundy Act payments have already done occasionally in New York). The premise of such challenges is somewhat problematic. It is far from clear that legislatures in New York, Pennsylvania, New Jersey and Maryland would in fact increase support for the public sector to the extent the courts told them they could not constitutionally aid the private sector. Yet administrators in the public institutions cannot be blamed for looking longingly at the millions of dollars newly channeled to the once resolutely "independent" colleges and universities.

There are mounting disputes over resources at a third level—claims against an academic institution by the individual faculty member. The growing number of suits challenging decisions to deny tenure or reappointment really do represent conflicting claims to scarce resources, for everyone knows that the number of faculty positions is unlikely to increase and will probably diminish on many campuses. The increasing involvement of the courts in this area comes at a time when these decisions are already far more difficult and painful than they would have been in times of relative plenty. Yet in the 1960s the courts routinely declined jurisdiction of such disputes. Thus at a time when the allocation of scarce resources among faculty members' (and between academic and non-academic positions) has become a critical issue, the courts have dramatically entered the picture. Once in the picture, they are quite likely to remain.

In all these areas, increasing resort to the courts for resolution of disputes over resource allocation seems virtually certain. The very success of Michigan's major universities in turning the tables of accountability on the lawmakers enhances the appeal of litigation. Students and faculty members have secured and asserted their rights through the courts. There seems no reason why administrators who have been defendants in the student and faculty cases should not now become plaintiffs.

Access to the Benefits of Higher Education

The courts also offer an increasingly accessible forum for the claims of historically excluded or underrepresented groups. We sometimes forget that the Supreme Court's *Brown* decision striking down racial segregation in the public schools was anticipated by a series of cases involving exclusion or isolation of Negro students in southern white universities. Since that time the courts have considered other dimensions of access—sex, geography, and political affiliation as well as race. Decisions in these areas have done much to increase the accountability of higher education.

There is no longer any question whether public universities may exclude members of racial minorities, although "dual" educational systems have persisted longer at the collegiate than the elementary level. The difficult racial issues today are those of preferential admissions or "reverse" discrimination in favor of minority groups. In a long-awaited decision, the Supreme Court of Washington recently said that a state university (at least its law school) may apply racial preference so long as there is "compelling interest." Something stronger than an idealistic or altruistic desire to help the poor and disadvantaged must be shown. The validity of preferential programs (either for admission of students or employment of staff) would seem to turn upon a demonstration of educationally valid and compelling reasons for departing from racial or ethnic neutrality. Such reasons might include doubts about the reliability and fairness of standardized test scores. The university's desire to overcome the effects of past discrimination might also be relevant. A professional commitment to make

faculties and student bodies more nearly representative of the national population might be persuasive. Or the university might feel compelled to prepare minority and disadvantaged persons to fill vital public service roles that white-anglo graduates cannot meaningfully assume. These and other goals may justify variation or expansion of traditional selection criteria under the "compelling interest" test which the Washington court announced in the *DeFunis* case.

The role of residence as a measure of access has also been extensively challenged. The courts have consistently rejected attacks on nonresident tuition and fee differentials, and higher grade point requirement for out-of-state applicants. In fact, the United States Supreme Court has recently affirmed without briefing or oral argument two lower court cases holding such differentials to be constitutionally valid. These precedents are not likely to be overturned.

In its June 1973 decision involving Connecticut's nonresident fee, the Court has, however, set some important limits. In most states a student who enters as a nonresident may eventually qualify for resident status and hence for the lower tuition rates. That was the flaw in the Connecticut law, however; students who were originally classified as nonresidents could never change that classification for tuition purposes no matter how fully integrated in the life of the state they might become for other purposes. The Supreme Court held that such a rigid and permanent delineation violated the due process clause of the Constitution. In striking down the Connecticut law, however, the Court clearly implied that more common forms of tuition differential would be valid, although of course that issue was not squarely before the Court. One portion of the opinion is particularly revealing:

> Nor should our decision be construed to deny a State the right to impose on a student as one element in demonstrating bona fide residence, a reasonable durational residency requirement, which can be met while in student status. We fully recognize that a State has a legitimate interest in protecting and preserving the quality of its colleges and universities and the right of its own bona fide residents to attend such institutions on a preferential tuition basis.

Several salient conclusions emerge from the Supreme Court's discussion in the Connecticut case. First, durational residence requirements (presumably up to at least one year) appear to be valid differentials among students for tuition purposes. Second, however, the central criterion must be "bona fide residence"—that is, the reality rather than the legal fiction of where the student actually resides and maintains primary contacts. Third, a student who enters the university as a nonresident may not be forever barred from achieving resident status. Fourth, the required "waiting period" to qualify for resident status must include the time spent as a student, along with other periods of actual residence in the state. Subject to these limitations and qualifications, it now appears that resident-nonresident tuition and fee differentials are constitutional.

Courts will undoubtedly entertain growing numbers of suits involving claims of discrimination against academic women. The first few such cases have been rather inconclusive. Now that the Equal Employment Opportunity Commission has begun to bring affirmative action claims to the courts, the expansion of the judicial role in this area is assured. The courts will have to begin fashioning and applying a set of standards and principles appropriate to issues of sex discrimination much as they have done in the area of race.

Organizations as well as individuals have begun to seek the aid of the courts in gaining access to campus facilities. A couple of years ago a federal court in Virginia held that a state college could not constitutionally refuse to charter a campus arm of the American Civil Liberties Union since the objections to it were mainly political. The most significant case of this sort was decided by the United States Supreme Court about a year ago. The administration of a state college in Connecticut had refused to recognize a campus chapter of Students for a Democratic Society because the organization had a violent record at other campuses. Initially the district court insisted the college at least hold a hearing before denying recognition. Yet the administration still refused to allow SDS on campus because it would be a "disruptive influence" and would be "contrary to the orderly process of change." The Supreme Court unanimously held that a group could not be denied campus access on such grounds. The high court recognized that groups as well as individuals have First Amendment rights, and that denial of recognition to a student organization would abridge those rights unless it reflected reasonable apprehension of a clear and present danger. The burden was on the administration to show such a threat, and the Connecticut officials had not done so. Mere anticipation of violence based on the record of SDS chapters at other campuses would not suffice, since it reflected an invidious kind of guilt by association.

More troublesome than politically controversial groups like SDS have been homosexual and gay liberation organizations. Some institutions genuinely fear not only the violation of laws regulating sexual behavior, but also serious damage to the institutional image, loss of community and alumni support, and the like. The several courts that have ruled on the issue, however, have uniformly upheld the rights of such

groups to use campus facilities. No such case seems yet to have reached an appellate court; indeed, the Connecticut SDS case appears to be the only controversy over the legal status of student groups that has gone beyond the trial court level.

A single transcendent principle may govern all these cases. The validity of policies determining access to higher education depends upon the extent to which they reflect *educationally* valid interests. Preferential admission policies must show a "compelling interest" in *educational* terms; any vestigial barriers to equality for women are defensible only in clearly *educational* terms; distinctions between residents and nonresidents must be measured in terms of state's *educational* interests; and student organizations can be barred from campus only under *educationally* valid criteria. (Clearly some restrictions are valid in the academy which would not pass muster off campus—for example, a prohibition in a foreign language course against reading assigned works in translation. Certain parts of a campus—classroom buildings and the library, most clearly—require on educational grounds a degree of quiet that cannot be demanded on the public streets or in the parks. Yet as the Supreme Court most recently made clear this spring in the *Papish* case, "the first amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech. . . .") The message is obvious; different standards in any area affecting constitutional rights may be justified only by special and clearly defined academic interests. Policies defining access to higher education are clearly governed by this constraint.

Participation in the Making of Academic Decisions

A third area in which the courts are certain to become more active is that of participation, really a different kind of access. To some degree the student protests of the 1960s did open university decision-making channels for students who had been historically excluded. For other groups less inclined to mount the barricades the courts have offered a more peaceful avenue to participation. Two recent cases may illustrate the potential of litigation.

Several years ago a group of graduate students at Madison asked the senior faculty of the English Department to let them attend departmental meetings. When that request was refused, the students went to court, claiming that state law required departmental deliberations to be public. The legal issue was uncertain, so the judge ordered the department to hold one public meeting to determine its future policy on access. The senior faculty thereupon decided to open all future meetings, thus mooting the lawsuit. Thus the department may well have gone further than the court was prepared to compel it to go.

More recently a black community organization in North Philadelphia brought suit in federal court claiming it had been improperly excluded from policy decisions of the Temple University Mental Health clinic, a community service of the College of Medicine. The court ultimately denied relief, but warned that claims to participation might be presented in the future with different results if a clearer statutory or constitutional basis were invoked.

One need only consider the range of excluded groups and constituencies to measure the potential for litigation—not only students and community organizations, but alumni, nonacademic staff, emeritus faculty and others, all of whom have substantial interests not fully reflected in existing governance or decision-making processes. There are some obvious limitations, of course; no court is likely to honor an abstract claim to participate unless it is based upon some legal guarantee such as a state "open meeting" law or a federal "maximum feasible participation" mandate. Such statutory backing may not be too hard to find, however, as witness the solicitude of Congress for student and community participation embodied in Section 1202 of the 1972 education amendments.

Resorting to the Courts in the Future

Analysis of these specific areas of litigation leads naturally to a concluding question: To what extent will resort to the courts actually increase or decrease in the years ahead? The answer is quite problematic. On the one hand, the number of justifiable claims and grievances is likely to increase. There will probably be more lawyers available to press these claims, partly as a result of experience with student cases and partly through the spread of collective bargaining. On the other hand, people throughout higher education are becoming increasingly aware of the considerations underlying the Florida bill with which we began—the very high monetary and human costs of litigation. Moreover, it is not clear that the increasing involvement of lawyers means more lawsuits; a responsible attorney realizes better than most laymen how and when his clients' interests may be helped by staying out of court. Collective bargaining may also have a deterrent rather than a catalytic effect on litigation; many complaints that would formerly have gone to the courts may in the future be channeled through the grievance machinery provided by union contracts.

Finally, the conduct of all parties will respond increasingly to the rulings they know (or fear) courts would make if the issue were adjudicated. Once it is clear that being sued carries many risks even if a

favorable result is assured—seldom the case in real life—then the incentive to stay out of court becomes powerful indeed. A threat of suit, unless frivolous, may be as effective in many instances as the actual filing of a complaint. That would not have been the case ten or probably even five years ago, when academic administrators either believed they could not be sued at all or would surely be vindicated if they were.

Presentations made by Messrs. O'Neil and Daane in Chicago were recorded and are available from NACUBO, on the same tape cassette, for $5.00.

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